IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1313

GATEWAY BOOKS, INC., MOD BOOKS, INC., DIXIE BOOKS, INC., PAPERBACK BOOKMART, U.B. INC., 45 8TH STREET CORPORATION, CARL SNYDER, JOE MANNING, JOHN MARTIN, MARK MASON, and AIRPORT BOOK STORE, INC.,
Petitioners,

v.

MAYNARD JACKSON, in his capacity as Mayor and BOB HAMER, Bureau Director of the Licensing Division, and LEE P. BROWN, in his capacity as Public Safety Commissioner of The City of Atlanta,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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Respondents respectfully pray that a writ of certiorari does not issue to review the opinion and judgment of the Supreme Court of Georgia entered in the above-styled action on September 6, 1978.

REASONS FOR DENYING THE WRIT

I.

THE CITY OF ATLANTA ADULT ENTERTAINMENT ESTABLISHMENT LICENSE ORDINANCE IS NOT VIOLATIVE OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY REQUIRING A LICENSE TO ENGAGE IN THE OPERATION OF AN ADULT ENTERTAINMENT ESTABLISHMENT.

Licensing of bookstores and movie theaters is not a per se violation of the United States Constitution as Petitioners would seem to suggest in the brief submitted in support of their petition for writ of certiorari. See Times Film Corp. v. Chicago, 365 U.S. 43 (1961). A municipality may enact an ordinance, for legitimate purposes, requiring those who would exercise their freedom of speech to obtain a license in advance. Cox v. New Hampshire, 312 U.S. 569 (1941).

Petitioners proffered the contention in the State Court that the issues involved in the instant case are controlled by the case of Coleman v. Bradford, 238 Ga. 505 (1977). Petitioners again have offered the Coleman case as supportive of their arguments and cite Coleman on pages 17 and 18 of their brief.

In Coleman, the Chatham County, Georgia Commissioners appealed an order of the Chatham County Superior Court which held unconstitutional a county ordinance adopted to license and regulate adult entertainment establishments in the unincorporated area of the county. Showboat Cinema, Appellee in Coleman, applied for and obtained a general theater license after paying the required $500.00 license fee. After a police investigation it was discovered that Appellee, on a weekly basis, exhibited either X-rated films or films depicting nudity or sexual conduct. After hearing, the Appellants concluded that Appellee was an adult theater and should be licensed under the "Adult Entertainment Establishment" Ordinance. The trial court enjoined the enforcement of the adult movie provision of the ordinance and also found the ordinance unconstitutional as it pertained to adult movie theaters. The trial court specifically found §2(e) of the ordinance to be invalid. That section provided as follows:

> "§2(e). Adult movie houses, which on a regular, continuing basis show nonobscene films rated X by the Motion Picture Coding Association of America, or any movie theater which presents for public viewing on a regular and continuing basis so called "adult films" depicting nudity or sexual conduct, shall pay an annual license fee of $1,500.00."

The Georgia Supreme Court noted, at the outset of its discussion in Coleman that,

> ". . . this ordinance is not intended to regulate or control the dissemination of obscene materials. Rather, by its terms, it deals specifically and exclusively with films that are not obscene. Thus, this ordinance is an attempt to regulate materials which are a form of expression fully protected by the First Amendment." Coleman, pp. 506, 507.

The Georgia Supreme Court reasoned that since the Chatham County ordinance dealt specifically with nonobscene films, the films, though possibly in bad taste, were constitutionally protected and the ordinance "imposed an invalid prior restraint on the freedom of speech and is a violation of the equal protection clause." Coleman, p. 507.

The Court addressed the question of equal protection in light of the trial court's determination that the ordinance treated adult movie theaters differently from other theaters showing nonobscene movies solely because of the content of the film presented. The Court noted, however, that classifications may be imposed stating:

> "Under the close scrutiny test, the government imposing the classification bears a heavy burden. It must

> show that the classification is in furtherance of a compelling state interest and that any discrimination incidental to the classification is no greater than that essential to the compelling state interest." Coleman, pp. 509, 510.

The Court noted that the Appellants generally asserted interest to protect the "public health, safety and morality", was not enough to meet the Appellants' burden of showing a furtherance of a compelling state interest. Coleman, p. 510.

In the case at bar, the decision of which is presently cited as Airport Book Store, Inc., et al. v. Jackson, et al., 242 Ga. 214 (1978), the Court specifically found that Coleman was not applicable to the facts which were presently before it. Airport Book Store, pp. 219, 220. The Court further found that the subject ordinance was not devoid of the required constitutional standards setting forth the grounds on which the license shall be granted or denied, Airport Book Store, p. 222, and thusly found that cases such as Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), wherein the ordinance there contained no such standards, did not apply.

The Respondents have not designed an ordinance which specifically seeks to regulate or prohibit nonobscene materials, nor have the Respondents sought to suppress the access or availability of such materials, nor have they sought to reach

such a result. The Respondents have designed and implemented an ordinance whereby they do not seek to inhibit free speech, but rather to protect a legitimate governmental concern, that of regulating and seeking to prevent criminal activity which, the record in the instant case shows, pervade and habitually occur within the confines of such establishments.

The Georgia Supreme Court noted the criminal activity in its decision stating:

> "A hearing was held in the trial court at which a vice officer testified as to numerous arrests of bookstore customers for solicitation of sodomy, sodomy and public indecency occurring in the adult mini station picture theaters (peep machines) located in the rear of four bookstores." Airport Book Store, p. 219.

It is well settled that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. Young, et al. v. American Mini Theaters, Inc., et al., 427 U.S. 50 (1976); Greer v. Spock, 424 U.S. 828 (1976); California v. La Rue, 409 U.S. 109 (1972); Tinker v. Des Moines School District, 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Richter v. Dept. of Alcoholic Beverage Control of the State of California, 559 F. 2d 1168 (9th Cir. 1977).

In O'Brien, supra, this Court held that a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests

> "if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, p. 377.

There is no question that the subject ordinance is within the police power of the City Council of the City of Atlanta to enact. The interest of a municipality to prevent and regulate crime is a fundamentally legitimate concern deeply rooted in American society. See Berman v. Parker, 348 U.S. 26 (1954).

The City of Atlanta's Adult Entertainment Establishment License Ordinance does not work to close any establishments such as petitioners, nor does it restrict access by the public to petitioners' materials. The ordinance merely provides a vehicle for the regulation of criminal activity, such activity shown to habitually occur within the confines of establishments.

The Respondents, most assuredly, have a compelling interest in containing and preventing the criminal activity shown by the record to exist. Moreover, the subject ordinance, in Section 1, specifically states for its purpose, among other things that of ". . . preventing the use of adult entertainment establishments for unlawful purposes."

In the case of John McDaniel, d/b/a Union Station Books v. Maynard Jackson, et al., CA 78-1282A, U.S.D.C., N.D. Georgia, (1979), Atlanta Division, the plaintiffs sought to declare the subject ordinance unconstitutional on essentially the same grounds as the instant Petitioners. Nevertheless, this federal district court concluded, inter alia, as a matter of law, that:

> "As a result of criminal activities such as sodomy and public indecency occurring in adult book stores, the City of Atlanta has a compelling interest in regulating these establishments and under such circumstances may license them." At page 7 of the opinion.

For the foregoing reasons, the City of Atlanta Adult Entertainment Establishment License Ordinance is constitutional and the petition for writ of certiorari should be denied.

II.

THE LICENSING REQUIREMENTS AND PROCEDURES OF THE CITY OF ATLANTA ADULT ENTERTAINMENT ESTABLISHMENT LICENSE ORDINANCE ARE NOT VIOLATIVE OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioners have seemingly contended by their brief that the five year ban on persons convicted of crimes violates equal protection as between adult bookstores and theaters on the one hand and "regular" bookstores and theaters on the other hand. However, for a person to be subject to the five year ban, the crime must be one relating to sexual offenses, or alcohol or drug offenses. The ban is an exercise of the police power and is reasonable. Legislation which defines the qualification for one who engages in an occupation or profession affecting the public health, safety, morals or welfare is a proper exercise of the police power. DeVeau v. Braisted, 363 U.S. 144 (1960); Hawker v. New York, 170 U.S. 189 (1898).

There is no issue that the subject ordinance does not permanently bar anyone from employment in an adult entertainment establishment. While the ban is an exercise of the police power and may permanently bar employment, see Hawker, supra, the ordinance merely places a five year ban on those convicted of certain offenses, as a safeguard in furtherance of the City's compelling interest in preventing crime within such businesses.

The reporting and disclosure requirements of the subject ordinance attached by the Petitioner, are the means of gathering the data necessary to investigate the applicant and detect violations of the ordinance. Such disclosure requirements are not violative of the constitution. Buckley v. Valeo, 424 U.S. 1 (1976).

Respondents have attempted to assure that the persons who operate the subject establishments and those who are employed therein, by their action or inaction, do not allow criminal activity of the kind which is the subject of the instant ordinance. It is a matter of logic that since the public authority, under its police power, has the right and indeed the duty to investigate those wishing to obtain licenses, and to charge a fee to defray administrative costs, Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935); Chemline, Inc. v. City of Grand Prarie, 364 F. 2d 721 (5th Cir. 1966), it must require background information in order to reach an informative and knowledgeable determination.

The disclosure of financial records, as required by the ordinance, aids in the prevention of subterfuges, such as one applicant securing a license when in fact he acts only as a straw-man or front for another person who may not otherwise be legally entitled to receive such a license.

Petitioners have proffered the contention that by imposing upon adult entertainment establishments certain licensing requirements not imposed on other businesses the ordinance is rendered unconstitutional under the case of Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). However, there is no issue that the government may effect classifications in furtherance of a compelling state interest. Young, et al. v. American Mini Theaters, Inc., et al., 427 U.S. 50 (1976); United States v. O'Brien, 391 U.S. 367 (1968). In the case at bar, and unlike the cases cited by Petitioners in their brief, the Respondents have established a compelling state interest and have implemented an ordinance, constitutional in all respects, to further that interest.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that before filing the foregoing Brief I served the same upon:

Robert Eugene Smith
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by this day mailing a copy of said Brief with proper postage affixed thereto.

This 17th day of April, 1979.

Gary S. Walker